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COMMONWEALTH OF VIRGINIA, ex rel.

**DELTA RESOURCES, INC.,
Complainant**

v.

CASE NO. PST990004

**VIRGINIA ELECTRIC AND
POWER COMPANY,
Defendant.**

REPORT OF MICHAEL D. THOMAS, HEARING EXAMINER

April 12, 2000

HISTORY OF THE CASE

On December 6, 1999, Delta Resources, Inc. ("Delta") filed a formal complaint against Virginia Electric and Power Company ("Virginia Power") pursuant to Rule 5:6 of the Commission's Rules of Practice and Procedure. Delta, a Tennessee corporation owning coal reserves in southwestern Virginia, requests that the Commission investigate Virginia Power's use of the Virginia Coal Employment and Production Incentive Tax Credit (the "Tax Credit") provided by § 58.1-2626.1 of the Code of Virginia in connection with purchases of Virginia-produced coal for resale. Delta asserts the Tax Credit was not intended to be applicable to coal that is resold, and therefore Virginia Power should not be able to claim the credit on coal that it purchases and resells.

On January 28, 2000, Virginia Power filed a Motion to Dismiss and a Motion for Leave to File its Motion to Dismiss Out of Time with the Commission. In its Motion to Dismiss, Virginia Power argues the actions described in Delta's complaint comply with the Tax Credit. Virginia Power further argues the plain language of the statute does not prohibit Virginia Power from claiming the Tax Credit on Virginia coal that is purchased and then resold. Finally, Virginia Power argues that it complied with Virginia law; therefore, Delta's complaint should be dismissed for failing to state a cause of action for which the Commission may grant relief.

By Hearing Examiner's Ruling entered on January 31, 2000, Virginia Power's Motion for Leave to File its Motion to Dismiss Out of Time was granted and Delta was afforded an opportunity to file a response to Virginia Power's Motion to Dismiss.

On February 10, 2000, Delta filed a Reply to Virginia Power's Motion to Dismiss, a Motion for Leave to File an Amended Complaint, and an Amended Complaint. In its Reply to Virginia Power's Motion to Dismiss, Delta argues Virginia Power's actions do not comply with the Tax Credit statute. Delta argues the language of § 58.1-2626.1 does not support Virginia Power's argument that the language of the Tax Credit statute confirms the appropriateness of Virginia Power's actions. Delta argues the only logical construction of the statute is that a corporation furnishing water, heat, light or power is entitled to the tax credit only if it consumes the coal to

produce power for the Commonwealth or its citizens. Delta argues any other interpretation would render the limitation to power producers pointless. Delta further argues if Virginia Power's interpretation of the Tax Credit statute is followed, the statute would be in direct contradiction to the public policy expressed in the Virginia Antitrust Act. (Virginia Code § 59.1-9.2 et seq.). Delta further argues that, as interpreted by Virginia Power, the Tax Credit statute is not "constitutionally sound." Delta argues Virginia Power's interpretation may raise a constitutional objection under the Commerce Clause. Finally, Delta argues that Virginia Power failed to show how its use of the Tax Credit promotes interstate commerce.

In its Motion for Leave to File an Amended Complaint, Delta states that a more specific recitation of the basis of its formal complaint and claims for relief is necessary for the Commission and Virginia Power to be fully apprized of the issues to be addressed in this matter.

In its Amended Complaint, Delta raises four issues for Commission consideration. First, whether Virginia Power's use of the Tax Credit violates the Virginia Antitrust Act. Second, whether Virginia Power's use of the Tax Credit violates § 58.1-2626.1 of the Code of Virginia. Third, whether Virginia Power's use of the Tax Credit violates the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3. Finally, whether Virginia Power's use of the Tax Credit violates the Equal Protection Clause of the United States Constitution, amend. XIV, § 1. Delta asks for injunctive relief as well as a refund of any Tax Credit claimed by Virginia Power for Virginia coal that was later resold.

By Hearing Examiner's Ruling entered on February 16, 2000, Virginia Power was afforded an opportunity to file a response to Delta's Motion for Leave to File Amended Complaint.

On March 8, 2000, Virginia Power filed a Motion to Dismiss Delta's Amended Complaint. In its Motion, Virginia Power argues there are several independent reasons the Commission should dismiss Delta's Amended Complaint. First, Delta lacks standing to have any of its claims adjudicated by the Commission because it is not an "aggrieved party" within the meaning of Rule 5:6 of the Commission's Rules of Practice and Procedure. Second, the Commission does not have jurisdiction to hear Delta's Virginia Antitrust Act claim, since such actions are required to be brought in Circuit Court. Third, the language of § 58.1-2626.1 of the Code of Virginia supports Virginia Power's use of the tax credit in connection with purchases of Virginia coal for resale. Fourth, Delta lacks standing to bring federal constitutional claims against a private party. Finally, even if Delta had standing to bring federal constitutional claims against Virginia Power, it failed as a matter of law to sustain its Commerce Clause and Equal Protection claims.

By Hearing Examiner's Ruling entered on March 20, 2000, Delta was afforded an opportunity to file a Reply to Virginia Power's Motion to Dismiss Delta's Amended Complaint.

Delta filed its Reply to Virginia Power's Motion to Dismiss Amended Complaint on March 24, 2000. Delta argues it has standing to bring an action before the Commission because it has been aggrieved by Virginia Power's misuse of the Tax Credit. Delta argues that its claim is not a tax case questioning the level of gross receipts taxes paid by Virginia Power or the amount of tax revenue lost by the Commonwealth. Rather, Delta argues its case is based on the theory that Virginia Power's misuse of the Tax Credit has enabled it to pursue bidding practices that have

disrupted the markets for Virginia coal and caused damage to Delta and other Virginia coal producers. Delta further argues it has alleged that it has suffered a direct, economic loss in the nature of lost royalties caused by Virginia Power's misuse of the Tax Credit.

Regarding its antitrust claim, Delta argues Virginia Power has mischaracterized the basis of Delta's claim for relief. Delta argues the relief that it is seeking in Count One of its Amended Complaint is not derived from the Antitrust Act. Rather, Delta is requesting the Commission to enjoin the misuse of the Tax Credit by Virginia Power as a valid exercise of the Commission's regulatory powers, pursuant to §§ 56-35 and 56-248.1 of the Code of Virginia. Delta argues Virginia Power's attempts to monopolize the coal markets in violation of the Antitrust Act are so intertwined with its status as a regulated public utility that the Commission is empowered to enjoin Virginia Power's secondary sales of Virginia coal for which it claimed a tax credit.

Delta disputes Virginia Power's analysis of § 58.1-2626.1 of the Code of Virginia, both in its present form and as amended by House Bill 1135 ("HB 1135") in the 2000 legislative session. Delta argues the plain meaning of the statute is that a corporation is entitled to the credit only when directly engaged in furnishing power to the Commonwealth when the power that is supplied is the basis for its claim to the Tax Credit. Delta argues any other construction would render the limitation to companies furnishing power pointless. Delta argues the amendments to § 58.1-2626.1 adopted by the legislature in HB 1135 confirm its position that the application of the Tax Credit for purchases of Virginia coal for resale was never contemplated by the legislature.

Finally, Delta argues it has standing to pursue its Commerce Clause and Equal Protection Clause claims before the Commission. Delta argues Virginia Power's misuse of the Tax Credit results in discrimination against out-of-state utilities that are precluded from purchasing Virginia coal at the same price as Virginia Power, and out-of-state coal producers who are unable to compete with Virginia Power in the sale of Virginia coal. Delta argues the Tax Credit as applied by Virginia Power burdens interstate commerce. Applying the rational basis test of the Equal Protection Clause, Delta argues no legitimate state interest is served by granting Virginia Power an advantage via the Tax Credit in the sale of Virginia coal. Delta urges the Commission to overrule Virginia Power's Motion to Dismiss and set this matter for an evidentiary hearing.

By Hearing Examiner's Ruling dated April 5, 2000, Delta's Motion for Leave to File an Amended Complaint was granted and the Amended Complaint was accepted for filing.

DISCUSSION

Notwithstanding Delta's pleadings to the contrary, the threshold issue in this case is whether Virginia Power was entitled to claim the Tax Credit provided by § 58.1-2626.1 of the Code of Virginia for Virginia-produced coal that it purchased and later resold. Delta's entire case rises and falls on this one issue. If Virginia Power was entitled to take the Tax Credit, Delta's antitrust and constitutional claims are rendered moot for failing to state a claim for which relief may be granted by the Commission. These claims are premised on Virginia Power's "misuse" of the Tax Credit statute. If there was no "misuse" of the Tax Credit, there is no basis for the constitutional claims

against Virginia Power. If Virginia Power was not entitled to claim the Tax Credit, then, and only then, does the Commission need to decide the remaining issues in this case.

Virginia Power argues the actions described in the Amended Complaint comply with the Tax Credit statute. Virginia Power relies on the rule of statutory construction that a statute must be construed from its four corners and not by singling out a particular word or phrase. Virginia Power argues the actual language of the statute supports its actions. Delta also relies on the plain meaning rule of statutory construction in support of its argument that the statute requires a public utility to consume the coal in order to claim the Tax Credit. Delta argues any other construction would render the statute's limitation to companies furnishing power meaningless.

The statute provides:

- A. For the tax years beginning on and after January 1, 1988, ***every corporation in the Commonwealth doing the business of furnishing water, heat, light or power to the Commonwealth or its citizens***, whether by means of electricity, gas or steam ***shall be allowed a credit against the tax imposed by § 58.1-2626*** in the following amount: one dollar per ton for each ton of coal contracted for purchase by such corporation after July 1, 1986, ***provided such coal was mined in Virginia as certified by the producer of such coal***. This credit shall be prorated equally against the corporation's estimated payments made in September and December and the final payment.
- B. For tax years beginning on and after January 1, 1989, ***every corporation in the Commonwealth doing the business of furnishing water, heat, light or power to the Commonwealth or its citizens***, whether by means of electricity, gas or steam ***shall be allowed additional credit against the tax imposed by § 58.1-2626*** in the following amount: one dollar per ton for each ton of coal purchased by such corporation, ***provided such coal was mined in Virginia as certified by such seller***. The credit shall be prorated equally against the corporation's estimated payments made in September and December and the final payment.
- C. For tax years beginning on and after January 1, 1991, ***every corporation in the Commonwealth doing the business of furnishing water, heat, light or power to the Commonwealth or its citizens***, whether by means of electricity, gas or steam ***shall be allowed additional credit against the tax imposed by § 58.1-2626*** in the following amount: one dollar per ton for each ton of coal purchased by such corporation, ***provided such coal was mined in Virginia as certified by such seller***. The credit shall be prorated equally against the corporation's estimated payments made in September and December and the final payment. (§ 58.1-2626.1 of the Code of Virginia) (emphasis added).

If statutory "language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it." *Brown v. Lukhard*, 229 Va.

316, 321, 330 S.E.2d 84, 87 (1985). “[W]here the disputed provisions of a statute are plain and unambiguous . . . we are not concerned with the logic or wisdom of the legislature; we apply the statute as written.” *Dairyland Ins. Co. v. Sylva*, 242 Va. 191, 195-96, 409 S.E.2d 127, 130 (1991).

As written, the Tax Credit statute does not prohibit the actions complained of in Delta’s Amended Complaint. Whether those actions are good or bad for the Commonwealth is a matter best left for the legislature to decide. The language of the statute relied on by Delta limits the class of corporations that may claim the Tax Credit. It does not place any limitations on those corporations on what they must do with the Virginia coal they purchase. It is interesting to note that the statute in its present form permits a water company to claim the Tax Credit for Virginia-produced coal that it purchases. To the best of my knowledge coal is not consumed in the water production or delivery process. A water company may use charcoal filters to purify its water, but charcoal is a byproduct of burning wood, not coal. Additionally, the use of coal-fired water pumps probably stopped in the early 1900’s, well before this statute was enacted by the legislature. Yet, in 1986 when the Tax Credit statute was adopted, the legislature clearly intended that water companies have the benefit of the Tax Credit. It could be that the statute’s primary purpose was to stimulate the production and sale of Virginia coal in the face of a weakening worldwide demand for coal, not necessarily to provide a tax credit for Virginia public utilities. If this is the case, it is irrelevant what happens to the coal after it is purchased by a public utility. The legislature may have balanced the economic impact of employment in southwest Virginia against the loss of tax revenue to the Commonwealth and determined that the greater good could be achieved by supporting Virginia’s coal mining industry. The tax credit was merely the mechanism for the legislature to accomplish this goal. If this is the case, neither a water company nor Virginia Power would be prohibited from purchasing Virginia coal for resale and claiming the Tax Credit. If the legislature wanted to prohibit this result from occurring it could have done so in clear and uncertain terms.

In the 2000 legislative session, the General Assembly passed HB 1135. This bill amended the Tax Credit statute by including in subsections A, B, and C a requirement that the corporation claiming the tax credit consume the coal.¹ The amendments are effective for tax years beginning on and after January 1, 2001. In addition, the bill contains a provision that the amendments shall not “be applicable to any contracts to purchase coal whose bid closing dates are before the introduction date of this bill.” (HB 1135 at 2). The Governor approved HB 1135 (Chapter 929 of the 2000 Acts of Assembly) on April 9, 2000. The act will become effective January 1, 2001.

As a general rule, statutory amendments are to be applied prospectively unless the legislature clearly indicates that it is to be applied retrospectively. *Farish v. Courion Industries, Inc.*, 722 F.2d 74, 77 (4th Cir. 1983); *Paul v. Paul*, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974); *Ferguson v. Ferguson*, 169 Va. 77, 87, 192 S.E. 774, 777 (1937). The language used by the legislature clearly evinces its intent that the amendments are to be applied prospectively and they were not intended to impair any existing contract rights. The coal contracts that give rise to Delta’s Amended Complaint are specifically excluded from the requirement that the corporation claiming the Tax Credit consume the coal. This effectively eliminates any claim Delta may have had that Virginia Power “misused” the Tax Credit statute by reselling Virginia-produced coal for which it had claimed the credit. Since there was no “misuse” of the Tax Credit by Virginia Power, Delta

¹ The amended statute still permits a water company to claim the Tax Credit. Although, it is now more difficult than ever to conceive of a situation where a water company would ever qualify for the Tax Credit.

failed to establish an essential element of its Antitrust, Commerce Clause and Equal Protection claims and those claims must be dismissed.

For the reasons set forth above, I find that Virginia Power's Motion to Dismiss Delta's Amended Complaint should be granted. Accordingly, **I RECOMMEND:**

- (1) That the Commission enter an order dismissing Delta's Amended Complaint; and
- (2) That this matter be stricken from the Commission's docket of active cases.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

Michael D. Thomas
Hearing Examiner